LIBRARY
SUPREME COURT, U. S.

FILED
DEC 21 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1557

ALVIS G. SPEIGHT, t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,

Appellants,

vs.

LEWIS R. SLATON, In his capacity as
District Attorney, Atlanta Judicial
Circuit, and HINSON McAULIFFE, In his
capacity as Solicitor General,
Criminal Court of Fulton County,

Appellees,

On Appeal from the United States District Court for the Northern District of Georgia

APPELLEES' BRIEF

THOMAS R. MORAN
Assistant Solicitor
Criminal Court of
Fulton County
160 Pryor Street, Room 53
Atlanta, Georgia 30303

Counsel for Appellees

INDEX

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

QUESTION PRESENTED 1

Whether a federal district court should grant injunctive and declaratory relief absent special circumstances where there is an ongoing state civil proceeding that is an integral part of a state's enforcement of its criminal laws, the statute attacked has not been authoritatively construed by a state court, and all constitutional issues could be raised in defense of a single pending state proceeding.

STATEMENT 2

ARGUMENT 3

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers 398 U.S. 281 (1970) 9,10

Cousins v. Wigoda, 463 F.2d 603 (7th Cir. 1972) stay denied 92 S.Ct. 2610 (1972) 10,11

Davis v. State, 199 Ga. 839, 35 SE 2d 458 (1945) ... 8

Duke v. Texas, 477 F.2d 244 (5th Cir. 1973) ... 9,13,15

Fisher v. Federal National Mortgage Assoc., 360 F. Supp. 207 . . (D.C. Md. 1973) 5,9,11,13

TABLE OF AUTHORITIES

Page

Cases

Fornaris v. Ridge Tool, 400 U.S. 41 (1970) 5

Gable v. Jenkins, 309 F. Supp. 998, aff'd 397 U.S. 592 (1969) 4

Geiger v. Jenkins, 316 F. Supp. 370 (N.D. Ga. 1970) aff'd 91 S.Ct. 1236 10,13,14

General Corporation v. Baxley, U.S. District Court Northern District of Alabama, Civil Action 73-194-N.E. decided Oct. 18, 1973 13,15

Harrison v. NAACP, 360 U.S. 167 (1957) 6

Kingsley Books v. Brown, 354 U.S. 436 (1957) 13

Lake Carrier's Association v. Mac Millan, 406 U.S. 498 (1972) 5,7

Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973) ... 5,11,12

Major v. Ferdon, 325 F. Supp. 1141 (N.D. Cal 1971) 6

Miller v. California, — U.S. — 37 L.Ed. 2d 419 (1973) 4,6

Mitchum v. Foster, 407 U.S. 225 (1972) 5

Mitchem v. Fla., 250 So 2d 883 (1971) 9

New Riviera Arts Theatre v. Tenn., 219 Tenn. 652, 412 S.W. 2d 890 9

O'Neil v. Battisti, 472 F.2d 789 (6th Cir. 1972) 6

Porter v. Kimzey, 309 F. Supp. 993, aff'd 91 S.Ct. 1237 6

Paris Art v. Slaton, — U.S. — 37 L.Ed. 2d 446 (1973) 7

Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1971) 7,13,14

TABLE OF AUTHORITIES

Page

Cases

Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) 5

Reetz v. Bozonich, 397 U.S. 82 (1970) 5,9

Romero v. Caldwell, 455 F.2d 1163 (5th Cir. 1972) .. 7

Roy v. Jones, 349 F. Supp. 315 (W.D. Pa. 1972) .. 10,14

Sanders v. Ga. Supreme Court of Georgia Case #28352 argued Oct. 10, 1973 3

Sanders v. McAuliffe U.S.D.C. N.D. Ga. No. 18, 913 8

Slaton v. S.S.W. Corp., Ga. Sup. Ct. Case #28400 .. 8

Walter's v. Slaton, 227 Ga. 676 182 SE 2d 464 (1971) 7

Wells v. Hand, 238 Fed. Supp. 779 (M.D. Ga. 1965) 11

Younger v. Harris, 401 U.S. 37 (1971) 9,10

1040 Peachtree Corporation v. Slaton, 228 Ga. 102, 184 SE 2d 144 (1972) 7

Zweckler v. Koota, 398 U.S. 241 (1967) 5,6

STATUTES

Ga. Code Ann. 26-2101 ..... 2, 4, 13, 15

Ga. Code Ann. 26-2103 ..... 2, 3, 4, 7, 8

Ga. Code Ann. 26-2104 2

Ga. Code Ann. 72-101 4

Ga. Code Ann. 72-301 8

Ga. Code Ann. 72-302 16

28 U.S.C. 2283 ..... 11, 13

42 U.S.C. 1983 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1557

ALVIS G. SPEIGHT, t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,

Appellants,

vs.

LEWIS R. SLATON, In his capacity as District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, In his capacity as Solicitor General, Criminal Court of Fulton County,

Appellees,

On Appeal from the United States District Court for the Northern District of Georgia

APPELLEES' BRIEF

OPINION BELOW

The opinion below is reported at 356 F. Supp. 1101 (N.D. Ga. 1973).

QUESTION PRESENTED

Whether a federal district court should grant injunctive and declaratory relief absent special circumstances where there is an ongoing state civil proceeding

that is an integral part of a state's enforcement of its criminal laws, the statute attacked has not been authoritatively construed by a state court, and all constitutional issues could be raised in defense of a single pending state proceeding.

STATEMENT OF FACTS

On August 21, 1972, appellees in their official capacity filed an action to abate a nuisance upon the authority of a new Georgia Code Section (26-2103; 26-2104) enacted in 1971 by the General Assembly of Georgia in an act which became effective on April 1, 1971. This statute has not been construed or passed upon by the Trial Courts or the Appellate Courts in the State of Georgia. The action to abate a nuisance, filed by the State was based on three separate sales of magazines alleged to be obscene and in violation of Ga. Code Ann. 26-2101 (Ga. Laws 1968 pp. 1249, 1302; 1971 p. 344). The materials were sold to state agents, there was no seizure. Three magazines sold on one of the three dates alleged in the state's complaint were the subject of a criminal action which had resulted in a mistrial prior to the filing of the nuisance complaint.

The Harem Book Store was not closed nor were any materials seized, nor were any such actions contemplated by the State until a hearing. A rule nisi was issued scheduling a show cause hearing at 9:30 A.M. on August 25, 1972. After the case was called for a hearing on the temporary injunction and the State announced ready, a copy of the removal action filed that morning in the District Court for the Northern District of Georgia was served on the Court. The Georgia Court then held the action until a hearing on the re-

moval could be had. Before the hearing on the removal action could be had the appellants herein filed a Civil Rights Action (42 U.S.C. 1983) asking for the convocation of a three judge court seeking injunctive and declaratory relief, and alleging that the Georgia obscenity and nuisance statutes were unconstitutional as written and as applied.

The single District Judge to whom the removal action had been assigned stayed action pending a decision by the three judge panel. After a hearing during which appellants consistently responded that they could raise the same constitutional issues in the Georgia State Court, the three judge panel found no special circumstances requiring intervention, dismissed appellants' suit and remanded the case back to the State Court.

Appellants thereafter appealed the ruling of the District Court to this Court.

ARGUMENT

The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance.

Georgia Code Annotated 26-2103 (Ga.L.1971 pp. 344, 345)

At the outset it must be brought to the Court's attention that the issues involved in the instant case—the constitutionality of Georgia Code Annotated 26-2103 (Ga. L. 1971 pp. 344, 345)—is now before the Supreme Court of Georgia in the case of Sanders v. Georgia Case # 28352, argued October 10, 1973. (One day after probable jurisdiction noted in the instant case). The decision of the Georgia Supreme Court, if

rendered before oral argument, will be immediately forwarded to this Court.

It is important to note the posture of this case when the three judge panel was required to decide the threshold question of federal intervention. The three judge panel was confronted with a complaint that attacked the General obscenity statute of the State of Georgia. (Ga. Code Ann. 26-2101) and the nuisance statutes (Ga. Code Ann. 72-101 et al) plus Ga. Code Ann. 26-2103 set out above. Miller v. California — U.S. — 37 L.Ed. 2d 419 (1973) and its companion cases had not been decided at that time. The Georgia obscenity statute 26-2101 had been upheld in Gable v. Jenkins 309 F. Supp. 998, aff'd. 397 U.S. 592 (1969). The Georgia courts had not construed nor applied the recently enacted code section, Georgia Code Annotated 26-2103. There was no way of knowing if the General Nuisance statutes dealing with houses of prostitution (72-301 et al) could be applied to bookstores so as to work a forfeiture. There was still pending a criminal case brought against the former owner of the store which had been tried once but which resulted in a hung jury. And, most important, there was an ongoing state proceeding in which the appellants herein could raise all issues. Additionally, the state trial court had not acted yet. The case was "snatched right off the trial judges bench" so that all the Federal Court, in the way of State action had before it was a complaint asking for relief. Without construing Georgia statutes the federal court could not determine what relief the state court would or could grant the appellants' herein nor determine how the statutes would be applied by the State judiciary.

Even though 42 U.S.C. 1983 is an exception to the anti-injunction statute 28 U.S.C. 2283 Mitchum v. Foster, 407 U.S. 225 (1972); the District Court must still consider issues of abstention, comity and "general notions of equity or federalism, similar to those invoked in *Younger*." Concurring opinion of Mr. Chief Justice Burger, Mr. Justice White and Mr. Justice Blackmun. Mitchum v. Foster 407 U.S. 225 (1972). The admitted power of a federal court under the Civil Rights Acts to enjoin state proceedings is not to be used to upset federalism and centralize power. Fisher v. Federal National Mortgage Association 360 F. Supp. 207 (D.C. Md.) (1973). *See also* Lynch v. Snepp 472 F.2d 769 (4th Cir. 1973).

ABSTENTION

Abstention is an issue in this case, but the classical *Pullman*[1] situation is not present. *Zweckler v. Koota* 389 U.S. 241 (1967).

The doctrine of abstention admonishes that a District Court should postpone resolution of a challenge to the constitutionality of a state statute until there has been a definite construction of that statute by the State Court. Railroad Commission of Texas v. Pullman Co. 312 U.S. 496 (1941). The *Pullman* doctrine is simply a judicial doctrine that recognizes our concept of federalism and the desirability that state courts have the first chance at interpreting new state law. (Fornaris v. Ridge Tool, 400 U.S. 41 (1970)). Reetz v. Bozonich, 397 U.S. 82 (1970). For, the state statute may be susceptible to "a construction that would avoid or modify the Federal question. Lake Carrier's Association v. MacMillan 406 U.S. 498 (1972). For a federal court to

[1] Railroad Comm'n of Texas v. Pullman Co. 312 U.S. 496 (1941).

prematurely interpose its own declaration as to the State law would not aid the local courts in their duty, nor hasten its performance. Major v. Ferdon 325 F. Supp. 1141 (N.D. Cal. 1971). Therefore, the constitutionality of a state statute is a question for state courts initially. Porter v. Kimzey 309 F. Supp. 993, aff'd. 91 S.Ct. 1237. In deciding whether to abstain a federal court must balance the possibility that the construction rendered by the State would *avoid* or *modify* the constitutional question against the loss of time and its damage to the rights of the person attacking a state statute. A District Court cannot authoritatively construe a state statute, but a state court can. Harrison v. NAACP 360 U.S. 167 (1957). And, in the First Amendment area a State Court can authoritatively construe a statute to avoid constitutional issues. Miller v. California — U.S. — 37 L.Ed. 2d 419 (1973) and companion cases. However, in the instant case, the time element of abstention and respect for plaintiff's choice of forum do not apply, Zweckler v. Koota 389 U.S. 241 (1967) because there was an ongoing State proceeding where appellant admitted, he could raise his challenge and appellant sought federal intervention *after* the choice of forum had been made.

In the case of O'Neil v. Battisti 472 F.2d 789 (6th Cir. 1972), the court faced with a situation similar to the case at bar held that the district court should have abstained, the issue having its roots in the judicial system of the State of Ohio, and the state should be the first to resolve such issue *especially* where there is an *ongoing state proceeding*. In *O'Neil*, the Supreme Court of Ohio had begun disciplinary proceedings against an attorney and had issued its order. The District Court was petitioned to enjoin the enforcement of the

Supreme Court's order. Likewise where Federal and State questions are meshed, abstention would be proper even where there is no ongoing state case. Romero v. Caldwell 455 F.2d 1163 (5th Cir. 1972). In other cases the courts have abstained where there are no pending state actions. In Lake Carrier's Association v. MacMillan 406 U.S. 498, an action was brought in federal court attacking the Michigan Water Pollution Act of 1970 as unconstitutional. No state civil or criminal action was pending, but the statute had never been construed by Michigan courts. The court held that when the state statute is susceptible to a construction by the State Courts that would modify or avoid the federal question abstention was proper. In *Lake Carriers* the State and Federal Act was in conflict, but a recently issued list of federal clean water standards had been published and the court said that the state court should have the right under our dual judicial system to construe the state act in light of the new federal standards.

In the instant case, the Georgia Courts have never construed Georgia Code Annotated 26-2103. Appellant is in error when he cites 1040 Peachtree Corp. v. Slaton 228 Ga. 102, 184 S.E. 2d 144 (1972). In that case a single film—(*Sandra*) was attacked as obscene in an adversary hearing procedure filed preparatory to a seizure for a criminal action. The abating of the *premises* was *not* involved. The action was identical to that in *Paris Art v. Slaton* — U.S. — 37 L.Ed. 2d 446 (1973). *1040 Peachtree* was Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1971) when it appeared in Federal Court. Walters v. Slaton 227 Ga. 676, 182 S.E. 2d 464 (1971) was likewise an adversary hearing procedure attacking one film.

No state case except the recent case of *Sanders v. Georgia supra* now awaiting decision has dealt with the abatement of a building for selling obscene materials. Many constructions of the statute are possible and probable when construed in light of prior Georgia law. For example, the only forfeiture nuisance statute refers to " . . . place used for purpose of lewdness, assignation or prostitution." Georgia Code Annotated 72-301. Under Georgia law forfeiture and padlocking can only occur where a statute expressly authorizes it. Davis v. State 199 Georgia 839, 35 SE 2d 458 (1945). Is a bookstore a place used for the purpose of lewdness, assignation or prostitution? A State Court answer in negative would modify the federal question considerably. Since this case arose, the Supreme Court of Georgia has held in an order dated October 1, 1973, in Slaton v. S.S.W. Corp. Georgia Supreme Court Case #28400 cited in Sanders v. McAuliffe N.D. Georgia #18,913, that a temporary injunction against a single movie must be made permanent within 60 days. A holding which, in all probability, would extend to actions brought under Georgia Code Annotated 26-2103.

The Georgia Courts could hold under the wording of the statute that a prior criminal conviction involving the material must be obtained before the state could base an abatement action on the sale of such materials. One sale may not be enough, multiple sales may be required and multiple convictions. In fact, the isolated transaction question is now before the Georgia Supreme Court in the *Sanders* case referred to above. Therefore, state action conceivable could modify the federal question or confine the statute to a narrow ambit which would avoid the constitutional question and by ab-

staining the Federal Court avoided any possible irritant in the federal-state relationship. Reetz v. Bozanich 397 U.S. 82, 86-87 (1967). Other State's Courts have construed similar statutes' to avoid constitutional questions. New Rivieria Arts Theatre v. Tennessee 219, Tennessee 652, 412 S.W. 2d 890; Mitchem v. Florida, 250 So 2d 883 (1971). In light of the foregoing, the District Court properly concluded that some "Special circumstances" would have to be present in order to justify intervention.

COMITY

The District Court was correct in holding that in this case for federal intervention, special circumstances must be pleaded and proven and that these special circumstances are to be measured by *Younger* bad faith harassment.

The doctrine of Comity grows out of respect for our constitutionally created dual system of justice, Younger v. Harris 401 U.S. 37 (1971). It rests on a proper respect for state functions and recognition that the national government will fair best if the states and their institutions are left free to perform their separate functions in their separate ways. Fisher v. Federal National Mortgage Association 360 F. Supp. 207 (D.C. Md. 1973). Ordinarily the jurisdiction of a state court first obtained should not be interfered with by federal courts. *Fisher Supra;* Duke v. Texas 477 F.2d 244 (5th Cir. 1973). And, as a general rule any doubt concerning the propriety of an injunction against state proceedings should be resolved against the granting of an injunction. Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers 398 U.S. 281 (1970).

There must be some special circumstances to justify federal intrusion into a state court action; either criminal Younger v. Harris 401 U.S. 37 (1971); civil; Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970); Cousins v. Wigoda 463 F.2d 603 (7th Cir. 1972) or quasi-criminal Roy v. Jones 349 F. Supp. 315 (W.D. Pa. 1972); Geiger v. Jenkins 316 F. Supp. 370 (N.D. Ga. 1970) aff'd. 91 S.Ct. 1236. In the case of Cousins v. Wigoda 463 F.2d 603 (7th Cir. 1972) stay denied 92 S.Ct. 2610 (1972), plaintiffs brought an action challenging delegates to the national party convention. There was a state civil action pending at the time the federal complaint was filed. The District Court abstained holding that simply a chilling effect on First Amendment Rights did not justify federal intervention where irrevocable injury had not been established. The Court said:

> "Thus assuming without deciding that the state complaint contains a frivolous and overly broad prayer for relief which if granted *in haec verba*, would impair the First Amendment rights . . . we hold that the mere existence of such a possibility does not justify a federal court's entry of an order effectively excising that prayer from the State complaint. The partial stay of the state court proceeding cannot be supported by mere speculation that an Illinois chancelor might commit flagrant error. The principals of comity and federalism which the Supreme Court has repeatedly emphasized demand a higher respect for the state judiciary. ". . . (E)xcessive prayers . . . is not the kind of conduct described as bad faith or harassment." Cousins v. Wigoda 463 F.2d 603, 608 (7th Cir. 1972).

The District Court, furthermore, cannot base its jurisdiction upon anticipated erroneous action by the

state court, Wells v. Hand 238 Fed. Supp. 779 (M.D. Ga. 1965).

In the instant case appellant cites the mere pendence of a claim as chilling First Amendment rights, however, as shown above, this in itself is not enough to justify federal intervention.

And, furthermore he simply bases his claim of irreparable injury on some hypothetical action by Georgia Courts. But, the true test in determining intervention is the pendency of state proceedings and whether the moving party will suffer irreparable injury that cannot be eliminated by his defense of the single state civil action. Lynch v. Snepp 472 F.2d 769 (4th Cir. 1973) app. pending.

It cannot be overemphasized that it is admitted in the case at bar, that appellant could raise all constitutional issues in the pending state court proceeding.

Even though *Younger* makes a distinction between civil and criminal cases, 28 U.S.C. 2283 does not.

The application of general notion of comity, equity and federalism to determine whether federal courts should enjoin state officers should not turn on labels such as "civil" or "criminal" but rather upon analysis of the competing interests. Lynch v. Snepp 472 F.2d 767 (4th Cir. 1973) app. pending.

The courts have applied *Younger* standards in Civil cases Lynch v. Snepp 472 F. 2d 769 (1973); Cousins v. Wigoda 463 F.2d 603 (4th Cir. 1972). Fisher v. Federal National Mortgage Association 360 F. Supp. 207 (D.C. Md. 1973).

In *Lynch supra* plaintiffs' filed a suit in federal district court to enjoin two orders issued by a state court

prohibiting anyone other than students, employees, teachers, parents transporting children and those with permission from school authorities from entering upon certain school premises. The court held that intervention would be improper where there was no allegation or showing that whatever overbreath existed in the state courts orders could not be cured by immediate appeal to the state appellate courts. The court said:

> ". . . notions of comity, equity, and federalism applied since the early days of our Union . . . occupy a highly important place in our history and our future, their application should never be made to turn on such labels as "civil" or "criminal" but rather upon an analysis of the competing interests in each case. Lynch v. Snepp 472 F.2d 769 (4th Cir. 1973).

In *Fisher supra*, homeowners sued to enjoin a pending state foreclosure proceeding. The Court held in dismissing the suit that the homeowners could challenge the legality of the action in the state forum and the homeowners had not alleged any bad faith harassment.

The court said (citing Lynch v. Snepp 472 F.2d 767) that

> "The *Younger-Lynch* rationale is based on the notion of comity which is posited on a proper respect for state functions and a recognition that the national government will fair best if the states' and their institutions are left free to perform their separate functions in their separate ways. . . . The admitted power of a federal court under the Civil Rights Act to enjoin state proceedings is not to be used to upset federalism and centralize power. The "pendency" of state proceedings is one of the most important criteria in determining whether federal court intervention in state action is ap-

> propriate. Fisher v. Federal National Mortgage Association 360 F. Supp. 207 (D.C. Md. 1973).

However, where the pending state action is quasi-criminal, that is where a civil action is an integral part of the enforcement of a state's police power, the use of *Younger* standards becomes even more persuasive *Duke v. Texas* 477 F.2d 244 (5th Cir. 1973). In the instant case the District Court construed the nuisance action as "an integral part of the state's enforcement of its criminal law." In Kingsley Books v. Brown 354 U.S. 436 (1957) this court said:

> whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination is a matter within the legislature's range of choice. 354 U.S. 436; 441 (1957).

Here, the state proceeded criminally and then civily. The civil action was being used to enforce the General obscenity statute (Ga. Code Ann. 26-2101) by attempting to remove the place where the alleged criminal activity was being and is still being committed. Palaio v. McAuliffe 466 F.2d 1230 (5th Cir. 1971). Duke v. Texas 477 F.2d 250 (5th Cir. 1973). General Corporation v. Baxley United States District Court, Northern District of Alabama, civil action 73-194-NE decided Oct. 18, 1973.

The concept of civil cases being criminal in nature so as to fall within the *Younger* requirements is not new. In Geiger v. Jenkins, 316 F. Supp. 370 (N.D. Ga. 1970) aff'd 91 S.Ct. 1236, it was held that a disciplinary action against a doctor was in the nature of a criminal proceeding and the district court refused to intervene citing 28 U.S.C. 2283. In *Geiger* the plaintiff was chal-

lenging a "state statute regulating activities in which the state has a vital interest." Geiger v. Jenkins; 316 F. Supp. 370, 373 (N.D. Ga. 1970); aff'd 91 S.Ct. 1236.

In the case of Roy v. Jones 349 F. Supp. 315 (W.D. Pa. 1972), the plaintiffs were justice's of the peace who had been suspended by a state supreme court order without hearing and notice. The suspended justice's brought a civil rights action to enjoin the state courts suspension order in federal court. The District Court held that intervention was improper where the state proceedings were brought in good faith, no violations of constitutional rights were shown and no likelihood of irreparable injury appeared.

The court said:

> "We think the test of irreparable injury used in deciding whether to intervene in state criminal proceedings is the appropriate criteria to use in deciding whether intervention is appropriate in this case. State disciplinary proceedings are similar in many ways to state criminal proceedings. Roy v. Jones 349 F. Supp. 315, 325 (W.D. Pa. 1972).

Three cases have applied *Younger* standards in refusing to intervene in an ongoing state nuisance proceedings.

In Palaio v. McAuliffe 466, F.2d 1230 (1971), the state brought an adversary hearing procedure against a single film. There was no statutory procedure so the state tracked common law nuisance and prayed that the film be subject to seizure after a temporary hearing. The District Court refused to enjoin holding that the principals of *Younger* should not depend upon such labels as "civil" or "criminal," but rather upon an analysis of the competing interests that each case

presents. And, when federal anticipatory relief will significantly affect a state's enforcement—by whatever means—or its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes.

In Duke v. Texas, 477 F.2d 244 (5th Cir. 1973) the District Court issued an injunction restraining the enforcement of an existing state court injunctive order which forbade plaintiff's below from speaking at North Texas State University. The court of appeals reversed and held that *Younger* principles of equity, comity, and federalism apply to federal intervention in state "civil" as well as criminal proceedings even where the exercise of First Amendment rights is involved *especially* where the civil action is an express additional sanction to a criminal statute. In *Duke* the criminal statute which plaintiffs in district court were alleged to have violated contained the added remedy of injunction. The chapter of the Georgia Code dealing with obscenity Georgia Code Annotated 26-2101 *et al* also allows for injunction as an additional sanction to the criminal case. Even though denominated civil, the State of Georgia is here, like the State of Texas in the *Duke* case simply asking for a remedy which the legislature of Georgia has provided as part of a comprehensive scheme for enforcement of its Penal Code. Finally in the case of General Corporation v. Baxley, United States District Court, Northern District of Alabama, Civil Action No. 73-194-NE decided Oct. 18 1973, the court held that intervention in a state proceeding to abate several theatres and bookstores as nuisances was improper absent bad faith harassment and irreparable injury. The court pointed out that the state pro-

ceedings to abate a nuisance complaint serve as a substitute for the criminal laws of the state, therefore, *Younger* applied. The Alabama statute was similar to the Georgia House of Prostitution statute, Ga. Code Ann. 72-302. The district court pointed out that, as in instant case, the plaintiffs failed to demonstrate bad faith or harassment or that irreparable injury would result if consigned to the state court remedies. The court also pointed out, as in the case here, that the state courts of Alabama could construe the statute in question to exclude bookstores and theatres thereby avoiding the federal question.

The cost of the duplication of effort in both time and money where a federal court intervenes in an ongoing state proceeding either civil or criminal implies that state courts are either incapable or unwilling to vindicate federal constitutional rights. However, it cannot be forgotten that the constitution calls upon state judges by name and puts upon them the obligation to apply the Supreme Law of the land. To presume that State judges will not do so absent proof would be to destroy our concept of federalism.

CONCLUSION

Therefore, the District Court was correct in holding that in this case the *Younger* requirements were applicable and that in addition abstention was proper. Appellee prays that the decision of the District Court be affirmed.

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel the within and foregoing Appellee's Brief by mailing two (2) copies thereof, postage prepaid, to:

ROBERT EUGENE SMITH, Esq.
Suite 507
102 W. Pennsylvania Avenue
Towson, Maryland 21204
(301) 821-6868

D. FREEMAN HUTTON, Esq.
Suite 2005
1175 Peachtreet Street, N. E.
Atlanta, Georgia 30309
(404) 892-8890

GILBERT H. DEITCH, Esq.
305 Maclellan Building
Chattanooga, Tenn. 37402
(615) 265-0517

This _____ day of December, 1973.

THOMAS R. MORAN